No. 7394

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT Z. EDDY, ALBERT P. EDDY, RAYMOND E. EDDY and GLADYS KANE,

Appellants,

vs.

NATIONAL UNION INDEMNITY COMPANY (a corporation),

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

SULLIVAN, ROCHE, JOHNSON & BARRY,
THEO. J. ROCHE,
EDWARD I. BARRY,
EUSTACE CULLINAN, JR.,
Mills Tower, San Francisco,
Attorneys for Appellants and Petitioners.

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We submit this petition for a rehearing of the foregoing case because in our opinion the decision of this Court in affirming the judgment of the lower Court was based upon a misapprehension concerning certain facts of the case and the law applicable to them. We respectfully call attention to pages 21-23 of appellants' brief for a concise statement of some of the pertinent and undisputed facts of the case.

The Court erred in holding that there were any more than two prior policies of insurance cancelled before the appellee issued its first policy of insurance.

In its decision this Court approved the finding of the trial Court that five policies of insurance had been cancelled on Dr. Carfagni before the appellee company had issued its first policy to him. The evidence however only supports the finding that two prior policies had been cancelled, and that the appellee had actual notice of both of these prior cancellations at the time it issued its first policy to the assured. This fact is important because this Court at the end of its opinion refused to consider whether the appellee by its conduct in arranging for the repair of Dr. Carfagni's car after knowledge of its right to rescind, waived the warranty as to prior cancellations of insurance. It was declared that the conduct of the appellee was prior to knowledge "of the three of the five cancellations" and so this Court held that "if any waiver resulted from such acts it was a waiver only as to the two cancellations known to the insurance company". We urge that the conduct of the appellee was a waiver as to the two cancellations known to the insurance company and that the evidence only supports the finding that there were two such cancellations.

It is true that one of the witnesses testified in the manner related by the Court in its decision with respect to the relation between "cancellation" and "replacement" of a policy. It might be noted, however, that the same witness (Tr. p. 80; p. 62) declared

that neither the Travellers Insurance Company nor the Washington Underwriters cancelled their policies although this Court included these two "cancellations" among the three cancellations which were alleged to have been unknown to the appellee company when it issued its first policy to Dr. Carfagni. The same witness likewise contradicted that part of his testimony which this Court quoted in its decision, when he declared that the only company which, according to his record, cancelled its policy was the Home Accident Company. (Tr. p. 81.)

With the exception of the testimony of Mr. Payne, quoted by this Court in its opinion, the record is free of any evidence that there were any cancellations other than the two of which the appellee company had actual knowledge when it issued its first policy to Dr. Carfagni. The quoted evidence of Mr. Payne does not support a finding that any cancellation, other than those two which were known to the appellee, took place. In order for a policy to be effectively cancelled, it must be terminated in the manner prescribed by the policy itself, otherwise an attempted cancellation is of no avail. A cancellation, therefore, cannot be established merely by having a witness mention that "it was cancelled" because such a declaration is only a conclusion of law. If the rule were otherwise an insurance company could merely produce an agent who would say that a policy "had been cancelled" and would establish a termination even though it had failed to conform with the requirements of the policy as to the mode of cancellation. In support of this contention we submit the following authorities

which, in each respective case hold that the declaration set forth under it was a mere conclusion of law and of no legal effect:

Dutch Flat Water Co. v. Monney, 12 Cal. 534.

That an agreement was forfeited.

Phinney v. Mutual Life Insurance Co., 67 Fed. 493.

That a contract was abandoned and rescinded.

McNulty v. Richmond Land Co., 44 Cal. App. 744,

and

Russell v. Cripple Creek Bank (Colo. 1922), 206 Pac. 160.

That a contract was in full force and effect.

W. H. Swanson Co. v. Pueblo Opera Co. (Colo. 1921), 197 Pac. 762.

That a lease had expired.

Hodges v. Lyon (La. 1923), 98 So. 49.

That a sale had been ratified.

Wardman v. Hutchins, 63 Fed. (2d) 892.

That a rescission had been elected.

Prichard v. Kimball, 190 Cal. 757.

That an instrument was invalid.

Rushton v. Reeve, 178 Cal. 199.

That a judgment had been fully "vacated, ordered and set aside".

Safe Deposit & Trust Co. v. Tait, 54 Fed. (2d) 383.

That a transfer was void.

Goltra v. Inland Waterways Co., 49 Fed. (2d) 497.

That a lease had been unlawfully terminated.

Day-Gormley Co. v. National City Bank, 8 Fed. Supp. 503, 73 Fed. (2d) 910.

That an interest in an account had been divested.

As a consequence the appellee cannot contend that it established that there were cancellations other than the two of which it had actual notice, merely by reason of the gratuitous statement of a witness that other policies had been "cancelled". Moreover, this Court was not justified in approving the finding that the "replacements" as explained by Mr. Payne in the testimony quoted in the decision of this Court, "were cancellations within the meaning of the warranty against cancellations of the policy in suit".

According to the unchallenged testimony of Mr. Payne, the mode of "replacement" was for the company to telephone or write to the broker and to ask him to place the policy elsewhere in order to avoid necessity of cancellation. It has been held that such an expression of desire or intention to cancel or a request to place insurance elsewhere does not constitute cancellation, and this Court was not justified in considering it the equivalent of cancellation.

In the case of

Beaumont v. Commercial Casualty Co. (Mich. 1928), 222 N. W. 100,

the company wrote to the plaintiff asking that he

> "kindly endeavor to procure this insurance with some other company by November 1st at which time we would like to be relieved."

The Court allowed recovery to the plaintiff who had sustained a loss thereafter, and in holding that there had been no cancellation used the following language:

> "Notice of cancellation of an insurance policy must be according to the provisions of the policy and be peremptory, explicit, and unconditional. American Fidelity Co. v. R. L. Ginsburg Sons' Co., 187 Mich. 264, 153 N. W. 709. It is not sufficient if it is equivocal or merely states a desire or intention to cancel. 14 R. C. L. 1009."

In all of the following authorities, it has been held that even notice to the insured himself of desire, or intention to cancel does not constitute a cancellation.

14 *R. C. L.* 1009;

Clark v. Insurance Co. of North America, 89 Me. 26, 35 Atl. 1008;

Savage v. Phoenix Ins. Co., 12 Mont. 458, 31 Pac. 66;

Davidson v. German Ins. Co., 74 N. J. L. 487, 65 Atl. 996;

Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309;

John R. Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N. W. 84.

It is well settled that even unequivocal peremptory notice in writing to a broker that a policy is cancelled does not constitute an effective cancellation, because

> "the agent has no power, after the policy is so delivered, to consent to a cancellation, or to accept notice of an intended cancellation by the insurer."

The foregoing language is quoted from 14 *R. C. L.* page 1011 where a long list of authorities is set forth,

in addition to the cases which we cite presently. As a consequence this Court was not justified in holding that the procedure outlined in the quoted testimony of Mr. Payne constituted a cancellation in law or in fact.

It was not for Mr. Payne to declare whether prior policies had been "cancelled" but the question of cancellation was a matter of fact to be proved only by evidence that the various companies had followed the procedure for cancellation prescribed in their respective policies. Mr. Payne in his quoted testimony described "replacements" as being informal notices to the broker to replace insurance with another company, which of course does not constitute a "cancellation" in any legal sense.

In the case of

Grace v. American Central Ins. Co., 109 U. S. 278, 27 L. Ed. 932,

an insurance broker was orally notified by the company that the company refused to carry the risk any further. The insurer demanded the return of the fire insurance policy, and the broker notified the company that the policy would be returned to it. Shortly thereafter the property upon which the fire insurance policy was issued, was destroyed. In allowing recovery upon the policy the Supreme Court of the United States declared that the authority of an insurance broker ceased upon the execution of the policy, and that the policy had not been cancelled because notice to a broker "of its termination by the company was not notice to the insured".

In the case of

White v. Insurance Co. of New York, 93 Fed. 161,

it was held that

"the fact that an insurance broker was authorized to procure insurance does not make him the agent of the insured to receive notice of the cancellation of the policies."

In the case of

Kehler v. New Orleans Insurance Co., 23 Fed. 709,

it was held that

"notice from the company to the broker who procured the policy, of an election to terminate the insurance was not notice to the assured."

In order to avoid repetition we direct the attention of this Court to pages 135 and 136 of appellants' brief which contain numerous authorities explicitly holding that notice of cancellation when given to an insurance broker does not operate as a cancellation of the policy.

Moreover, we urge upon the Court the following cases, all of which hold that an attempted cancellation in order to be effective must be in strict conformity with the manner of cancellation set forth in the policy.

See:

Filkins v. State Assurance Co., 8 Fed. (2d) 389;

Magruder v. U. S., 32 Fed. (2d) 807;

Beaumont v. Commercial Casualty etc. Co. (Mich. 1928), 222 N. W. 100;

Spring etc. Co. v. Parker (Mo. 1927), 289 S. W. 967;

American Fidedity Co. v. Ginsberg (Mich. 1927), 153 N. W. 709.

There was therefore no justification for the finding that any policies of prior insurance had been cancelled save those two policies of which the appellee had actual knowledge at the time it issued its policies to Dr. Carfagni, even if an actual notice of cancellation had been served on the broker. The only evidence to support such a finding is based upon alleged conclusions of a witness whose testimony was quoted in the opinion of this Court. Therefore, it is necessary for this Court to pass upon the question set forth in the last three paragraphs of its decision in this case with respect to the effect of the conduct of the appellee in incurring a bill for the repair of Dr. Carfagni's car after having had knowledge of the two prior cancellations.

We again call attention to the confusion that led the trial Court into the belief that more policies of insurance were cancelled on Dr. Carfagni than was actually the fact. From Plaintiffs' Exhibits 9 and 10 (Tr. p. 232; p. 236) it will be observed that on October 5, 1928, the Pacific Employers Insurance Company issued policy No. 26543 upon Dr. Carfagni's automobile. This was one of the policies of which the appellee had actual notice of cancellation. The transcript further reveals (p. 63) that on October 5, 1928, the same date, the Western States Insurance Company issued a policy bearing the same number 26543 to Dr. Carfagni on the same automobile. The identity of numbers and dates of inception reveal that these two policies were the same, and that the error probably arose out of the incorrect code letter on Plaintiffs' Exhibits 9 and 10.

Furthermore, the evidence shows that on October 6, 1928 (Tr. p. 71), the Washington Underwriters issued Policy No. 26503 on the automobile owned by Dr. Carfagni.

The trial Court erroneously concluded that three separate policies had been cancelled on Dr. Carfagni respectively by the Pacific Employers Company, the Washington Underwriters Company and the Western States Company, and that the appellee at the time it issued its first policy to Dr. Carfagni had no knowledge of any of these three cancellations.

All of these three companies had Mullin & Acton as their general agents. (Tr. p. 238; p. 231.) The identity of dates of inception and numbers proves that the Pacific Employers policy (Plaintiffs' Exhibits 9 and 10), and the Western States policy were the same. Furthermore, according to the uncontradicted evidence of Mr. Breeden, who is employed by the appellee, the Western States was merely general agent for the Washington Underwriters. (Tr. p. 238.) As a consequence the Court was in error in assuming that each of these policies represented a separate cancellation in a different company.

This Court misconstrued the argument set forth in subdivision X of appellants' brief with respect to the effect of Section 633(d) of the Political Code of California.

In its opinion this Court apparently assumes that appellants contend that Section 633(d) of the California Political Code conflicts with the terms of the policy with respect to the limitation of an agent's au-

thority to waive the provisions of a policy. It is our contention that Section 633(d) of the California Political Code giving the local agents of an insurance company the exclusive authority to approve risks and to countersign policies, enhanced the dignity of the local agents so that their knowledge constituted knowledge of the company itself and enabled them to waive provisions of the policy even in the absence of written authority. This contention, we believe, is completely sustained by the authorities contained between pages 96 and 111 of appellants' brief, showing that such an effect has been given to the authority of agents in cases involving similar policies issued in states having like statutes.

The finding that the appellee company itself knew of the prior cancellations renders it unnecessary to consider the limitation of the authority of an agent.

Between pages 71 and 96 of appellants' brief the distinction is made between a case in which only an agent knew of the facts constituting grounds for the alleged cancellation and where, as here, the Court found that the *appellee company itself* knew of the alleged grounds for cancellation at the time the policy sued upon was issued. In its decision this Court proceeded upon the assumption that only the knowledge of an agent of limited authority was involved, instead of the knowledge of the appellee company itself. The authorities which we cited illustrating the distinction between the knowledge of an agent and the knowledge of the company itself, make the ques-

tion of the limitation of the agent's authority immaterial in this case and justify a rehearing.

CONCLUSION.

The statement of facts set forth in the opening paragraphs of appellants' brief compels the conclusion that the equities of this case are overwhelmingly on the side of the appellants who had no hand in the procurement of the original policy, and who are only seeking to recover from the insurance company payment of a judgment which they obtained against Dr. Carfagni, the insured. In the light of the authorities cited at pages 51 and 52 of appellants' brief setting forth the rule that a construction of a policy which will avoid forfeiture is to be favored if such a construction can be reasonably given, we submit that this Court should allow a rehearing of this case.

Dated, San Francisco,
July 29, 1935.

Respectfully submitted,
SULLIVAN, ROCHE, JOHNSON & BARRY,
THEO. J. ROCHE,
EDWARD I. BARRY,
EUSTACE CULLINAN, JR.,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 29, 1935.

EUSTACE CULLINAN, JR.,
Of Counsel for Appellants and Petitioners.